

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 CARRIER COUSER,

12 Plaintiff,

13 vs.

14 PRE-PAID LEGAL SERVICES, INC.
15 d/b/a LEGAL SHIELD; TERRY FRICK;
and CALLFIRE INC.,

16 Defendant.
17

CASE NO. 12-CV-2575-LAB-WVG

**ORDER RE: CALLFIRE'S
MOTION TO DISMISS**

18 This is a Telephone Communications Protection Act case in which Couser accuses
19 Defendants of making approximately 40 unsolicited and prerecorded calls to her cell phone.
20 Now before the Court is CallFire's motion to dismiss. CallFire's basic argument is that it's
21 an "intermediate software provider" that doesn't itself control the content, destination, or
22 timing of calls, and therefore can't be liable under the TCPA. The implication of this, of
23 course, is that if there are culprits in this case, they are Legal Shield and Frick.

24 **I. Legal Standard**

25 A 12(b)(6) motion to dismiss for failure to state a claim challenges the legal sufficiency
26 of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The Court must accept
27 all factual allegations as true and construe them in the light most favorable to Couser.
28 *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir.

2007). To defeat CallFire’s motion to dismiss, Couser’s factual allegations needn’t be detailed, but they must be sufficient to “raise a right to relief above the speculative level” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That is, “some threshold of plausibility must be crossed at the outset” before a case can go forward. *Id.* at 558 (internal quotations omitted). A claim has “facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

While the Court must draw all reasonable inferences in Couser’s favor, it need not “necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (internal quotations omitted). In fact, the Court does not need to accept any legal conclusions as true. *Iqbal*, 129 S.Ct. at 1949. A complaint does not suffice “if it tenders naked assertions devoid of further factual enhancement.” *Id.* (internal quotations omitted). Nor does it suffice if it contains a merely formulaic recitation of the elements of a cause of action. *Twombly*, 550 U.S. at 555.

II. Factual Background

This isn’t a complex case. Legal Shield is a company that provides plans, or contracts, for legal services. CallFire is a company that provides software enabling its customer companies to send voice messages to a wide audience. That’s the Court’s description of CallFire, at least. Couser says it “provides voice and text connectivity”; CallFire more or less accepts that and says it “provides its customers various web-based applications that integrate communications services and other software services whereby its customers can utilize CallFire’s software platform to develop and send their own voice broadcasts to recipients of the customers’ choosing.” (FAC ¶ 16; Mot. at 1.) Couser has an incentive to maximize CallFire’s responsibility for the calls at issue; CallFire has the opposite incentive.

1 In any event, Legal Shield used CallFire to promote its business, and Couser alleges
 2 that she received approximately 40 unsolicited promotional calls that were made with an
 3 automatic telephone dialing system *and* utilized an artificial or prerecorded voice. (FAC ¶
 4 30.) This is the most significant allegation:

5 Beginning in June 2012, at the express instruction and guidance
 6 of Legal Shield, through Legal Shield's employee and
 7 representative, Frick, Defendants began contacting Plaintiff for
 8 the purpose of soliciting Plaintiff's business, on her cellular
 9 telephone by way of an "automatic telephone dialing system," as
 defined by 47 U.S.C. § 227(a)(1) using an "artificial or
 prerecorded voice" as prohibited by 47 U.S.C. § 227(b)(1)(A).
 (FAC ¶ 26.)

10 To be clear—because the relevant TCPA statute contains four distinct prohibitions—Couser
 11 is alleging a violation of 47 U.S.C. § 227(b)(1)(A)(iii). (FAC ¶ 26; Opp'n Br. at 2.) This
 12 makes it unlawful "to make any call (other than a call made for emergency purposes or made
 13 with the prior express consent of the called party) using any automatic telephone dialing
 14 system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . .
 15 cellular telephone."

16 **III. Discussion**

17 CallFire makes a number of arguments favoring dismissal of Couser's claims against
 18 it. The Court will try to tease those arguments out and address them in sequence.

19 **A. Couser Doesn't Allege That CallFire Called Her.**

20 CallFire's first argument seems to be that Couser has failed to allege that CallFire
 21 even called her. If that's true, then naturally Couser's TCPA claims fail, because they
 22 require an actual call. 47 U.S.C. § 227(b)(1)(A).

23 The Court disagrees with CallFire. The allegations against it are thin, to be sure.
 24 Couser says CallFire is a California company "that provides voice and text connectivity" and
 25 "advertises and engages in text messaging through the use of automated dialers and
 26 prerecorded messages," which doesn't speak to its actions in this case at all. (FAC ¶¶ 16,
 27 18.) And then it says "Defendants began contacting Plaintiff for the purpose of soliciting
 28 Plaintiff's business," which CallFire argues isn't an allegation with respect to it. (FAC ¶ 26.)

1 It essentially is, though. The whole allegation, quoted above, is that “at the express
2 instruction and guidance of Legal Shield, through Legal Shield’s employee and
3 representative, Frick, Defendants began contacting Plaintiff for the purpose of soliciting
4 Plaintiff’s business, on her cellular telephone” Considering that there are only three
5 Defendants in this case—Legal Shield, Frick, and CallFire—this sentence only makes sense
6 if “Defendants” refers to CallFire. That is, the clear meaning of this allegation is that Legal
7 Shield, through Frick, commissioned CallFire to contact Couser. Thus, the Court isn’t
8 troubled by the fact that, as CallFire puts it, “Plaintiff never makes an allegation specifically
9 as to CallFire.” (Mot. at 5.) The allegation is adequately there in ¶ 26 of Couser’s complaint.

10 **B. CallFire Didn’t Call Couser, Anyway**

11 CallFire’s next argument is that, as a matter of fact, it isn’t the party that called
12 Couser, and this turns on a rather technical argument about how its service works that is
13 most likely beyond the scope of a motion to dismiss. In any event, the Court is inclined to
14 disagree with it.

15 CallFire’s motion to dismiss employs rather cagey language to describe its
16 responsibility for the unwanted calls Couser allegedly received. Initially, this language
17 deflects responsibility and places on its customers. For example, customers use CallFire’s
18 “software platform to develop and send their own voice broadcasts.” (Mot. at 1.) CallFire
19 “provides its customers connectivity to transmit their own messages to the recipients they
20 selected and at the time of their choosing.” (Mot. at 2.) The clear implication here is that
21 CallFire just provides software while its customers actually pull the trigger and make
22 telephone calls with that software.

23 But CallFire also describes its service in a way that suggests *it* actually places the
24 calls. For example, its Terms of Service notifies customers, “You represent and warrant that
25 the owners of the phone numbers you provide to CallFire, to which outbound messages and
26 broadcasts are transmitted through the Service” (Mot. at 2.) It also says, “You further
27 agree that CallFire is, under no circumstances, responsible for the contents and/or accuracy
28 of your messages or broadcasts and CallFire will only transmit them” CallFire argues

1 later in its motion that its role “is akin to a common carrier or software provider that simply
2 receives instructions and transmits based on those instructions without alteration.” (Mot. at
3 6.) This all gives the impression that CallFire *is* the caller, or certainly close enough to the
4 caller.

5 Whatever the true and exact relationship between CallFire and its customers is, the
6 Court finds it to be too fact-intensive, and certainly too disputed, to be resolved at the motion
7 to dismiss phase in CallFire’s favor. By CallFire’s own words, it receives numbers from its
8 customers and it transmits or delivers a recorded message to those numbers. That
9 essentially makes it a caller, at least by some common-sense definition of the term, even if
10 the customers are the chief architect of the calls.

11 **C. The TCPA Wasn’t Intended for CallFire**

12 CallFire’s last argument, and certainly its most substantive, is that Congress’s intent,
13 as well as numerous FCC rulings, make it very clear the TCPA isn’t intended to police
14 middlemen like CallFire that, even if they make calls in some technical sense, are
15 commissioned to make them by another entity and bear little responsibility for the timing,
16 content, or recipients of those calls. Couser tries to argue that this is an attempt to subject
17 her claims to a heightened pleading standard, which isn’t the case at all. CallFire’s argument
18 is simply that the TCPA doesn’t apply to it on the facts alleged, not that Couser has to allege
19 certain specific facts and has failed to do so. (The confusion seems to be that CallFire
20 believes its lack of responsibility for the content of the calls, among other things, exempts
21 it from TCPA liability, and Couser mistakenly reads this to mean that CallFire wants her to
22 specifically allege the content of the calls.)

23 For example, a section-by-section analysis of the TCPA from the Senate Committee
24 on Commerce, Science, and Transportation notes that its regulations “apply to the persons
25 *initiating* the telephone call or sending the message and do not apply to the common carrier
26 or other entity that transmits the call or message and that is not the originator or controller
27 of the content of the call or message.” S.Rep. No. 102-178 (1991), 1991 WL 211220 at *9
28 (emphasis added). And for its own part, speaking to the analogous instance of liability for

1 unsolicited faxes, the FCC has agreed that “carriers who simply provide transmission
2 facilities that are used to transmit others’ unsolicited facsimile advertisements may not be
3 held liable” *In the Matter of Rules and Regulations Implementing the TCPA of 1991*
4 (Oct. 16, 1992), 7 FCC Rcd. 8752, 8780. It continued, “In the absence of a high degree of
5 involvement or actual notice of an illegal use and failure to take steps to prevent such
6 transmissions, common carriers will not be held liable for the transmission of a prohibited
7 facsimile message.” *Id.* The FCC reiterated its opinion in 2003, finding that “if a common
8 carrier is merely providing the network over which a subscriber . . . sends an unsolicited
9 facsimile message, that common carrier will not be liable for the facsimile.” *Rules and*
10 *Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 FR 44144-
11 01, 44169 (July 25, 2003). It also found that a “high degree of involvement” was present
12 only if, for example, the carrier provides the facsimile numbers or reviews and controls the
13 actual content of the facsimiles. *Id.*

14 The Court is generally receptive to CallFire’s arguments; it does seem that Congress
15 and the FCC, if pressed, would absolve an entity like CallFire from liability under the TCPA
16 for Legal Shield’s promotional calls. It is also generally dismissive of Couser’s stubborn
17 rebuttal that she *alleged* CallFire called her and that’s all that matters. Yes, the Court has
18 to take her allegations as true at the motion to dismiss phase, but she alleges more than that
19 CallFire called her. She alleges that: (1) CallFire called “at the express instruction and
20 guidance” of Legal Shield” (FAC ¶ 26); (2) CallFire provides “voice and text connectivity”
21 (FAC ¶ 16); and (3) CallFire was Legal Shield’s actual agent (FAC ¶ 18). These allegations
22 feed right into CallFire’s argument that it is some kind of innocent middleman in Legal
23 Shield’s marketing scheme.

24 There are some limits, however, to what the Court can make of CallFire’s legal
25 sources. First, with respect to the Senate report, gleaning guidance from such sources is
26 a notoriously difficult endeavor. See *Gonzalez v. Arizona*, 677 F.3d 383, 441 (9th Cir. 2012)
27 (“The Supreme Court has warned us time and again not to rely on legislative history in
28 interpreting statutes, largely because of the ease with which floor statements and committee

1 reports can be manipulated to create a false impression as to what the body as a whole
2 meant.”) (Kozinski, J., concurring). Second, with respect to the FCC sources, there are a
3 few problems. The first is that CallFire’s arguments seems somewhat incomplete; the Court
4 can’t consider the FCC sources without some argument that the *Chevron* doctrine entitles
5 or compels it to—an argument that is quite easy to make. See, e.g., *Asher & Simons, P.A.*
6 *v. j2 Global Canada, Inc.*, 2013 WL 5645354 at *2–5 (D. Md. Oct. 16, 2013). Second,
7 analogous as facsimile transmissions may be to the phone calls at issue in this case, they
8 are prohibited by a different TCPA rule. Facsimiles are covered by 47 U.S.C. § 227(b)(1)(C),
9 and that is apparently the rule addresses by the FCC sources CallFire cites, while Couser
10 accuses CallFire of violating 47 U.S.C. § 227(b)(1)(A)(iii). Finally, with only pleadings to go
11 on and no discovery as to the precise relationship between CallFire and Legal Shield, it is
12 simply too early in this litigation for the Court to affirmatively conclude that CallFire is the
13 middleman it claims. That certainly looks to be the case, but CallFire well knows that the
14 evidence it submits—for example the declaration of its COO Jagannathan
15 Thinakaran—cannot be considered at the motion to dismiss phase.

16 For the above reasons, the Court rejects CallFire’s argument that Couser’s claim
17 should be dismissed based upon the intent of Congress in enacting the TCPA and the FCC’s
18 rulings in administering the statute. The motion to dismiss is therefore **DENIED**.

19 **D. Alternatively, this case should be stayed.**

20 This brings the Court to CallFire’s final argument, which is that the case should be
21 referred to the FCC under the primary jurisdiction doctrine, especially while it is already
22 considering the TCPA liability of software providers that merely transmit users’ own
23 messages. The primary jurisdiction doctrine applies when “an otherwise cognizable claim
24 implicates technical and policy questions that should be addressed in the first instance by
25 the agency with regulatory authority over the relevant industry rather than by the judicial
26 branch.” *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). It “prescribes
27 deference to an administrative agency where (1) the issue is not within the conventional
28 experience of judges, (2) the issue involves technical or policy considerations within the

1 agency's particular field of expertise, (3) the issue is particularly within the agency's
2 discretion, or (4) there exists a substantial danger of inconsistent rulings." *Maronyan v.*
3 *Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038, 1048–49 (9th Cir. 2011). While CallFire
4 asks the Court to *refer* this case to the FCC, it may simply be asking the Court to *stay* this
5 case while the FCC considers the issue at hand. *See, e.g., Glauser v. Twilio*, 2012 WL
6 259426 (N.D. Cal. Jan. 27, 2012).

7 For the reasons CallFire gives in its motion to dismiss, the Court believes the primary
8 jurisdiction doctrine has traction in this case. Not only that, but at least one other district
9 court case has stayed a TCPA case while the FCC considers the question this case
10 presents—the liability of a software provider under the TCPA. *See Glauser* at *2–3. Couser
11 is right to note that *Glauser* involves text messages and not prerecorded voice messages,
12 but for the purposes of the TCPA they are essentially the same and are actionable under the
13 very same statutory subdivision that's at issue in this case. *See Hickey v. Voxernet LLC*,
14 887 F.Supp.2d 1125, 1129 (W.D. Wash. 2012) ("A text message is a call under the TCPA.").
15 The Court is somewhat less receptive to Couser's argument that the plaintiff in *Glauser*
16 specifically alleged that the defendant provided a connectivity application, while her
17 complaint alleges that CallFire actually called Couser. First, as the Court has said above,
18 Couser's complaint also contains allegations that paint CallFire as a kind of middleman
19 party. But second, the Court presumably does *not* have to accept all of Couser's factual
20 allegations as true for the purposes of deciding whether to invoke the primary jurisdiction
21 defense. After all, the consequences of invoking the doctrine aren't nearly so fatal to
22 Couser's claims as are the consequences of granting a motion to dismiss.

23 Most importantly, as CallFire and the *Glauser* opinion note, the FCC is now
24 considering the liability of so-called common carriers, which is the very issue this case
25 ostensibly presents. *See Glauser* at *2 ("Similarly, the specific issue whether a text message
26 service provider qualifies as a common carrier exempt from liability pursuant to the TCPA,
27 is also currently under submission before the FC."). The petition under consideration would
28 essentially extend the FCC's above-mentioned rulings with respect to facsimiles to

1 companies that send or transmit voice or text messages on behalf of customers. The Court
2 therefore finds that the primary jurisdiction doctrine has great relevance in this case.
3 Nonetheless, whatever the FCC's ruling is, the question of liability will still turn on facts that
4 are undeveloped here and need to be further developed, namely the precise relationship
5 between CallFire and Legal Shield and the allocation of responsibility between them. That
6 is an issue on which CallFire has attempted to present substantial evidence already, but only
7 in a one-sided manner without the benefit of adversarial discovery. Thus, it seems to the
8 Court that this case should go forward. If, after taking discovery from CallFire and Legal
9 Shield, Couser still believes CallFire is liable under the TCPA, the Court will entertain a
10 renewed motion to stay this case under the primary jurisdiction doctrine, or, assuming the
11 FCC has spoken to the issue by then, a motion for summary judgment.

12 The Court reaches this conclusion mindful that the stay order in *Glauser* came on the
13 pleadings alone, at the motion to dismiss phase, but those pleadings were a bit more precise
14 as to the common carrier's role and liability: "Specifically, plaintiff alleges that defendants,
15 through their text messaging applications, tools, and/or technology, made unsolicited text
16 calls to plaintiff and other similarly situated, without their prior expressed consent, using an
17 automatic telephone dialer system." *Glauser* at *3. It may be that Couser's is stubbornly
18 sticking to her pleadings just to survive to discovery and increase the cost of this case to
19 CallFire, but that doesn't change the Court's view that one way or another CallFire's precise
20 relationship with Legal Shield, and the nature of its business, must be factually developed
21 if the claims against it are to be either dismissed or stayed. In any event, the discovery the
22 Court imagines Couser needing from CallFire is limited, and should not impose a substantial
23 cost on CallFire. Likewise, any subsequent motion to stay or for summary judgment can
24 largely repeat arguments CallFire has made in its motion to dismiss, and shouldn't require
25 extensive legal fees.

26 //

27 //

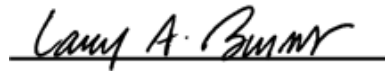
28 //

1 **IV. Conclusion**

2 CallFire's motion to dismiss is **DENIED**. The Court strongly senses that it has the
3 better arguments in this case, but those arguments simply can't be ratified at the motion to
4 dismiss phase of this case. Likewise, with additional discovery confirming that CallFire's
5 responsibility for the calls at issue is what it claims, the Court would be inclined to stay this
6 case under the primary jurisdiction doctrine, or, assuming the FCC has spoken to the issue,
7 rule definitively on it with a motion for summary judgment.

8 **IT IS SO ORDERED.**

9 DATED: January 16, 2014

10 

11 **HONORABLE LARRY ALAN BURNS**
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28